Supreme Court, U. S.
FILED
JUN 22 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1555

J. B. JOHNSTON and VESTA G. JOHNSTON,
Petitioners,

versus

CALVIN S. BYRD, RAY D. BRIDGES,
LEON G. DUKE, H. FEW, and JERE BENSON,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF FOR RESPONDENTS IN OPPOSITION

W. BOYD REEVES
1101 Merchants National Bank Bldg.
Mobile, Alabama 36602
Counsel for Respondents

NORMAN E. WALDROP, JR.
Armbrecht, Jackson & DeMouy
1101 Merchants National Bank Building
Mobile, Alabama 36602

LEON G. DUKE
Seale, Seale, Marsal & Duke
24th Floor, First National Bank Building
Mobile, Alabama 36602
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-1555

J. B. JOHNSTON and VESTA G. JOHNSTON,
Petitioners,

versus

CALVIN S. BYRD, RAY D. BRIDGES,
LEON G. DUKE, H. FEW, and JERE BENSON,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, Calvin S. Byrd, Ray D. Bridges, Leon G. Duke, Jr., H. Few, and Jere Benson, respectfully submit their brief in opposition to Petitioners' Writ of Certiorari seeking review by this Court of a judgment of the Alabama Supreme Court which affirmed a final decree of the Circuit Court of Mobile County, Alabama, In Equity.

OPINIONS BELOW

The opinion of the Alabama Supreme Court is reported at 258 So.2d 866 and is set out as Appendix A hereto. The opinion of the Circuit Court of Mobile County, Ala-

bama, In Equity, has not been officially reported and is set out as Appendix B hereto.

JURISDICTION

The Petitioners have asked this Court to review the ruling of the Alabama Supreme Court solely on the basis of 28 U.S.C. 1257(3). They have omitted informing this Court of the history of their questions presented for review in the state courts below [Supreme Court Rule 23(1) (f)]. By taking this tact, the Petitioners have clouded the jurisdictional issue of whether or not their questions presented are substantial federal questions or are merely factual inquiries decided adversely to them. The Respondents respectfully submit that the Petitioners' questions do not meet the jurisdictional prerequisites for certiorari from a state court.

QUESTIONS PRESENTED

The Respondents respectfully disagree with Petitioners' formulated issues. All three of the questions presented for argument by the Petitioners to this Court are questions which are premised on facts which either were decided adversely as to the Petitioners or were simply never raised by them in the trial court. The Respondents respectfully submit there are no substantial federal questions presented in this case for review since Petitioners' questions call for a review of facts and state law decided unfavorably to them.

STATEMENT OF THE CASE

The case originated by a bill of complaint filed by the Respondents herein against the Petitioners asking

the Mobile Circuit Court, In Equity, for an injunction against the Petitioners to prohibit them from continually filing a multiplicity of suits against the Respondents arising out of past litigation between Calvin S. Byrd and J. B. Johnston (R 1-4). Attached to and made a part of the bill of complaint was a settlement agreement executed by the Petitioners, J. B. Johnston and Vesta G. Johnston, and Calvin S. Byrd and Estelle Byrd (R 5-7), which is dated June 28, 1966 and attached hereto as Respondents' Appendix C. Along with the petition for injunction was filed a motion for a temporary restraining order (R 9) which was granted (R 13-14). After hearing on the merits, at which hearing evidence was presented by testimony, the Mobile Circuit Court, In Equity, issued a final decree enjoining the Petitioners as requested in the bill. The Alabama Supreme Court affirmed this final decree.

The entire controversy arose out of an incident occurring on August 22, 1961, when the Petitioner, J. B. Johnston, signed a warrant charging Calvin S. Byrd, one of the Respondents herein, with issuing worthless checks (R 31). Byrd was subsequently acquitted by a jury verdict (R 33) and filed suit against J. B. Johnston and Citronelle Timber and Auto Center for malicious prosecution (R 34-35) which resulted in a jury verdict against J. B. Johnston and Citronelle Timber and Auto Center in the amount of $31,630.00 (R 36). The verdict was affirmed by the Supreme Court conditioned upon a remittitur reducing the judgment to $15,000.00 (R 39) which final judgment was entered on May 9, 1966 (R 39).

Following the final adjudication of that appeal, a settlement agreement was entered into wherein the Petitioners, J. B. Johnston and Vesta G. Johnston, agreed to settle all controversies existing between them and the Respondent herein, Calvin S. Byrd; moreover, by the said settlement agreement, the Petitioners also released and discharged all court officials, all officials of the Circuit Court of Mobile County, Alabama, and all law enforcement officers, including the Honorable Walter B. Gaillard, Honorable Joseph Hocklander, Sheriff Ray D. Bridges, John E. Mandeville, and Leon G. Duke, some of which are the Respondents in this action. This settlement agreement is referred to in the record as complainants' exhibit number six (R 47) and attached hereto as Respondents' Appendix C. The consideration as set out in the release and settlement agreement was a payment by J. B. Johnston to Calvin S. Byrd of $10,000.00, for which Calvin S. Byrd and his wife, Estelle Byrd, agreed to convey all of their right, title and interest to real estate formerly owned by J. B. Johnston and which had been acquired by Calvin S. Byrd and Estelle Byrd by a sheriff's deed.

Prior to the settlement agreement of June 28, 1966 (R 49), various suits had been filed by Vesta G. Johnston against the Respondents herein. Complainants' exhibit number eight (R 56-57) was a suit to recover certain personal property which had been executed upon by the Sheriff of Mobile County and sold to satisfy the judgment in the case of Byrd versus Johnston. That case was dismissed by the United States District Court for the Southern District of Alabama and affirmed by the Fifth Circuit Court of Appeals on January 5, 1966 (R 72). Complainants' exhibit number seven (R 49-51),

styled Vesta G. Johnston versus Ray D. Bridges, Leon Duke, Calvin S. Byrd, case number 32,512, claims substantially the same property that is described and referred to in the United States District Court, Case Number 3402-64 (R 56-58).

The suit styled J. B. Johnston versus these Respondents, Case Number 32,613, which is Complainants' exhibit number nine (R 73-76), is substantially on the same theory and referred to the same subject matter as the suit referred to as Complainants' exhibit number ten, bearing Case Number 67-278-C (R 86-87), and styled J. B. Johnston and Vesta G. Johnston versus Leon Duke, as agent and attorney for Calvin S. Byrd, which resulted in a judgment for the Defendant therein, and which was affirmed by the Supreme Court of Alabama on December 3, 1970 (R 96-97).

Complainants' exhibit twelve (R 97-99) is a suit in the Circuit Court of Mobile County, Case Number 29,045, which alleges a malicious prosecution against the Defendants, the Respondents herein. This suit is a duplication of exhibit number thirteen (R 101-102) which is a suit by the same parties against the same Defendants, being Circuit Court Case Number 23,091, which resulted in a judgment for the Respondents herein, and has been affirmed by the Supreme Court of Alabama (R 105-109).

Complainants' exhibit fourteen (R 109) is a suit styled Vesta G. Johnston against Calvin S. Byrd and others, Circuit Court Case Number 19,551, which complains of a trespass and the complaint shows on its face that the alleged trespass occurred on May 6, 1966,

prior to the execution of the settlement agreement between the parties. Likewise, Complainants' exhibit fifteen (R 112) is another suit by Vesta G. Johnston and J. B. Johnston against Calvin Byrd, alleging the wrongful taking of property, on June 4, 1964, and on June 5, 1966, both dates as alleged, preceding the settlement agreement of June 28, 1966. Lastly, Complainants' exhibits seventeen and eighteen merely show the continuous filing of suits by the Petitioner, J. B. Johnston, against other parties.

The evidence in this case, both by oral testimony and exhibits admitted into evidence, shows that the Respondent, Leon G. Duke, a practicing attorney in Mobile, Alabama, has been inconvenienced, harassed, and sued by the Petitioners on several occasions during the past six or seven years. Mr. Duke testified that more than 250 legal working hours have been consumed in defense of the suits (R 124), that he (Respondent Leon G. Duke), has been libeled by the Petitioners and the Petitioners have made charges against him to the Alabama State Bar Association, and have caused him to be investigated by the Federal Bureau of Investigation. Mr. Duke further testified that the Petitioners have made statements in their pleadings and in open court that he was dishonest (R 24), and that as a result of the conduct of the Petitioners, the Respondent Duke suffered embarrassment and mental anguish (R 26).

The Respondent, Calvin Byrd, testified that he had been served with approximately a half a dozen suits which had been filed by the Petitioners, J. B. Johnston or Vesta G. Johnston (R 143), since execution of the

agreement by himself and Petitioners. Mr. Byrd further testified that these suits had caused him mental anguish and embarrassment (R 143).

Ray D. Bridges, Sheriff of Mobile County, one of the Respondents herein, testified that he has been sued approximately six times by the Petitioners, J. B. Johnston and Vesta G. Johnston (R 144). He also testified that he had been sued in the United States District Court and that the litigation has required his attendance in court numerous times and that he had been harassed, had been caused a certain amount of mental strain, and has been caused to expend a great deal of time in defending the suits (R 145-146).

The Petitioner, J. B. Johnston, testified that he was arrested and in support of his testimony offered Respondents' Exhibit A (R 152-159). On cross-examination, the Petitioner, J. B. Johnston, admitted that the arrest upon which he has been complaining occurred May 15, 1964, over two years prior to the execution of the settlement agreement by him (R 167) on June 28, 1966.

ARGUMENT

The decision of the Alabama Supreme Court below rests primarily on a review of the many facts involved in this action. Only two legal enunciations merge in that opinion: first, a court of equity may enjoin vexatious litigation; and second, the settlement agreement (Appendix C attached hereto) entered into between the Petitioners and the Respondents was valid and binding and hence operated to foreclose all prior and subse-

quent litigation between these parties. These two legal premises involve state substantive law rather than substantial federal questions. Admittedly, both of these legal premises operate in the penumbra of the Fourteenth Amendment Due Process Clause, but neither, as applied to the facts present in this case, were used to run afoul of this Due Process mandate. Indeed, Petitioners chose to forego direct attack upon these two legal propositions; instead, the Petitioners elected to cast their questions presented for review in terms of facts decided adversely to them.

An examination of Petitioners' three questions in light of the facts developed upon trial reveal that they are not substantial federal questions. Fundamentally, each question pragmatically states the existence of a fact or facts that the courts below decided adversely to the Petitioners.

a. *Petitioners' First Issue.*

The first question presented by the Petitioners assumes that there was a cause of action for malicious prosecution subsequent to the settlement agreement and further, that there was a breach of the settlement agreement. Exploration of the record below discloses that the malicious prosecution suit that Petitioners allege was subsequent to the settlement agreement was deemed not to be subsequent but prior, since the malicious prosecution suit was based upon a cause of action occurring before consummation of the settlement agreement (R-127, 128, 160). The Alabama Supreme Court carefully considered this point and held that the settlement agreement was so comprehensively worded

that the manifest intent espoused therein was to preclude all subsequent suits between all the parties involved, particularly one based upon a cause of action accruing prior to the date of the settlement agreement. As to the allegation that the Respondents breached the settlement agreement, the trial court, as the trier of fact, simply resolved this factual dispute adverse to the Petitioners; the Alabama Supreme Court reviewed this trial ruling and found it not to be erroneous. Thus, since the Petitioners' first question stands upon two factual assertions that were held to be to the contrary by the courts below, the question loses its force.

b. *Petitioners' Second Issue.*

The Petitioners' second question likewise assumes the existence of an important fact inasmuch as Petitioner Vesta G. Johnston did receive personal service of the subpoena and Bill of Complaint commencing this equity action as shown by the sheriff's return (R-11). Moreover, neither Petitioner sought to impeach the sheriff's return and thereby contradict this fact upon trial. Indeed, the proper method of challenging the veracity of the sheriff's return after judgment is in a separate and collateral proceeding. See *Edison v. McDaniel,* 216 Ala. 610, 114 So. 204 (1927); *Stewart v. Capital Fertilizer Co.,* 207 Ala. 598, 93 So. 641 (1922). And, of even more compelling significance, this Petitioner filed a demurrer to the temporary restraining order (R-13) and counsel, defending this action upon the final hearing, was said to be representing her (R-30). But in any event, the narrow issue presented is not whether Petitioner may be bound by a judgment

where she had no notice but rather the credibility of the evidence below which states that she did receive notice. Hence, the Petitioners seek to transform this factual issue into a Constitutional one by simply alleging that notice was never given nor received. Again, the Petitioners premise a Constitutional question upon a fact not supported by the record below.

c. *Petitioners' Third Issue.*

The Petitioners' third question is also subject to the same infirmity as the first two: the factual record below does not support the basic proposition upon which the inquiry stands. Abundant evidence at trial was introduced as to the validity of Petitioners' allegation that property was taken in excess of the judgment originally entered against them. (R-135, 137, 161-166.) The facts available in the record simply do not support this allegation. The issue was decided adversely to the Petitioners in the trial court and in the Alabama Supreme Court. Thus, there is no Constitutional issue presented by Petitioner's third issue, but only a factual question which has been fully reviewed by the court below.

d. *Summary.*

The Petitioners' questions do not present significant Constitutional questions which require review by this Court. The issues are simply narrow factual issues which were decided adversely to the Petitioners and do not present facts which compel review by this Court on certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari does not present questions of Constitutional significance such as necessitate review by this Court and hence the petition should be denied.

Respectfully submitted,

W. BOYD REEVES
Counsel for Respondents.

Norman E. Waldrop, Jr., Esquire
Armbrecht, Jackson & DeMouy
1101 Merchants National Bank Building
Mobile, Alabama 36602
Leon G. Duke, Esquire
Seale, Seale, Marsal & Duke
24th Floor, First National Bank Building
Mobile, Alabama 36602
Of Counsel

PROOF OF SERVICE

I, W. Boyd Reeves, the attorney for the Respondents herein and a member of the Bar of the Supreme Court of Alabama, hereby certify that on the ____ day of June, 1972, I served three copies of the foregoing brief for Respondents in opposition on J. B. Johnston and Vesta G. Johnston, Petitioners herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid, at their address, Post Office Box 322, Citronelle, Alabama 36522.

W. BOYD REEVES
Counsel for Respondents
1101 Merchants National
Bank Building
Mobile, Alabama 36601

RESPONDENT'S APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1971-72

Vesta G. Johnston and J. B. Johnston

1 Div. 677 versus

Ray D. Bridges, et al.

Appeal from Mobile Circuit Court, In Equity

McCALL, JUSTICE.

The gist of this suit, filed in equity by Ray D. Bridges, Sheriff of Mobile County, Calvin S. Byrd, a school teacher, Leon G. Duke, Jr., an attorney at law, H. Few and Jere Benson, deputy sheriffs, as complainants, against J. B. Johnston and Vesta G. Johnston, husband and wife, as respondents, is to enjoin the prosecution of certain court actions, pending against them, or some of them, in the Circuit Court of Mobile County, Alabama, and to restrain and enjoin the respondents Johnstons from filing further litigation against the complainants.

More particularly, the bill alleges that on August 21, 1961, J. B. Johnston had Calvin S. Byrd arrested on a charge of issuing a worthless check, that upon Byrd's acquittal, the latter filed an action for malicious prosecution against Johnston, that he recovered a

judgment for $31,630 against Johnston, which the Supreme Court affirmed, conditioned on Byrd's filing a remittitur, reducing the amount to $15,000, that Byrd filed the remittitur on April 28, 1966; that Calvin S. Byrd and his wife, Estelle Byrd, and J. B. Johnston and his wife, Vesta G. Johnston, executed a written agreement on June 28, 1966, to settle all differences between themselves, which then existed, or may have existed in the past, and to release and discharge all claims against all persons having to do with any and all litigation, involving Calvin S. Byrd and the Johnstons. This agreement is made a part of the bill of complaint. By its terms, the Byrds agreed to cancel the judgment in the malicious prosecution case, to dismiss a pending suit in equity against the Johnstons, and, in consideration of the payment by J. B. Johnston of $10,000 to Byrd, to convey to Vesta G. Johnston certain real property formerly owned by J. B. Johnston, which had been conveyed previously to Byrd by a sheriff's deed, dated May 25, 1964. The Johnstons agreed to pay the $10,000, to dismiss all pending cases against Calvin S. Byrd, and to release and discharge all claims against all court officials of Mobile County, all officers of the circuit court, all law enforcement officers and all other persons, having knowledge of, or executing official orders, in any and all litigation involving Byrd and Johnston. The bill alleges that the respondents since have filed numerous cases against the complainants and continue to file actions against them arising out of the differences which were settled and concluded by the settlement agreement of June 28, 1966, that the filing of these cases is an abuse of the court and an harassment and vexation of these complainants, causing them to suffer irreparable injury, and

that they have no adequate remedy at law to stop the harassment, vexation and injury to them.

The bill avers that in one case, number 32,512, which complainants seek to enjoin, the Johnstons claim property which has been the subject of a suit in the United States District Court that terminated adversely to the Johnstons and was affirmed by the Fifth Circuit Court of Appeals on appeal; that a second case, number 32,613, is substantially the same case as one, filed by the Johnstons against Leon Duke, as agent for Byrd, on the equity side of the court, to which a demurrer had been sustained, and that ruling affirmed by the Supreme Court; and that in a third case, number 29,045, the issue of malicious prosecution, counted on by J. B. Johnston, is the same cause of action set out in an earlier case between these same parties that resulted in a judgment for the complainants herein, and that it was affirmed by the Supreme Court. The complainants also allege in their bill that the claims, out of which the litigation in these three cases arises, were settled and concluded by the agreement of June 28, 1966, and that they were released and discharged by the appellants from these claims.

The first assignment of error is that the court erred in overruling appellants' demurrer to the petition seeking a temporary injunction. The first ground of this demurrer is that the complainants (appellees) have an adequate remedy at law in the defense of those pending cases that they complain about in their bill, viz.: 32,512, 32,613 and 29,043. The foregoing ground of demurrer is the equivalent of each of the two other grounds of demurrer, which are, respectively, (2)

"There is no equity in the bill," and (3) "The Complainants have an adequate remedy at law." So, all grounds of the demurrer being equivalent, we will treat them together. The grounds are general, and therefore only test the equity of the bill. Rule 14, Alabama Equity Rules, Tit. 7, Appendix, p. 1219, Code of Alabama, Recompiled 1958; *Alabama Lime & Stone Co. v. Adams*, 222 Ala. 538, 133 So. 580; *Wood v. Estes*, 224 Ala. 140, 142, 139 So. 331; *Percoff v. Solomon*, 259 Ala. 482, 489, 67 So. 2d 31. A general demurrer is properly overruled, if the bill contains any equity. *Cherry Investment Corp. v. Folsom*, 273 Ala. 575, 143 So. 2d 181; *Lauderdale County Board of Education v. Alexander*, 269 Ala. 79, 110 So. 2d 911.

In testing its sufficiency against a general demurrer, a bill to enjoin vexatious and harassing litigation contains equity. It is stated in Pomeroy's Equity Jurisprudence, Vol. 1, 5th Ed., 1941, § 261j, p. 551, as follows:

> "The prevention of vexatious, oppressive and ruinous litigation is a frequent cause for the exercise of equity jurisdiction, and injunctions to restrain a multiplicity of suits in such cases are not only permitted, but favored, by the courts. A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy, and the bringing of such suits will be enjoined to prevent a multiplicity of suits which would sub-

> ject the plaintiff to enormous expense and inconvenience."

In *Meredith v. John Deere Plow Co. of Moline, Ill.*, 8th Cir., 1958, 261 F. 2d 121, 124, cert. denied, 359 U.S. 909, 79 S. Ct. 586, 3 L. Ed. 2d 574, the court had a similar injunction before it and stated:

> "As to appellee's right to the injunction issued, the subjecting of another to repeated, baseless and vexatious suits at law on some particular subject matter is, without reference to other considerations, a sufficient ground for the issuance of an injunction against the perpetrator. First State Bank v. Chicago, R. I. & P. R. Co., 8 Cir., 63 F. 2d 585, 590, 90 A.L.R. 544; Lee v. Bickell, 292 U.S. 415, 421, 54 S. Ct. 727, 78 L. Ed. 1337. See also Martin v. Beaver, 238 Iowa 1143, 29 N.W. 2d 555, 558."

The language used by the Supreme Court of Minnesota in the case of *Favorite v. Minneapolis Street Ry. Co.*, 253 Minn. 136, 91 N.W. 2d 459, is appropriate here. There the plaintiff, a minor, was injured when struck by a street car. An action for damages was commenced in 1942. Upon petition of the father in November of 1942, the court ordered that an agreed settlement be approved and allowed, and also ordered that the defendants shall be finally absolved and acquitted from any further claims and demands by any person whomsoever on account of the accident and injuries to the minor. The parties stipulated that the action be dismissed, and the same was dismissed with prejudice. Subsequently, the plaintiff sought to reopen

the litigation and proceed once again. In granting injunctive relief the court said:

> "* * * Repeated litigation of a right which has been adjudicated with finality is without any legitimate purpose and constitutes a vexatious and oppressive harassment of a litigant in contravention of his right to a speedy and efficient administration of justice. If successive units could be brought to litigate the same questions between the same parties or their privies as often as either should choose, remedial justice would soon become a mere mockery. It is generally recognized to be proper for a court to issue a permanent injunction to restrain the initiation of successive suits and proceedings to relitigate a cause of action — based on the same facts and with identical issues and parties — which has already been adjudicated with finality."

We think that the equity in the complainants' bill is well laid in its averments, and in our opinion the court committed no error in overruling the respondents' general demurrer.

We deem it appropriate to state at this time that, in a case of this kind, the Supreme Court's jurisdiction is revisory and appellate solely. *Worthington v. Worthington*, 215 Ala. 447, 111 So. 224. The court will consider only rulings of the trial court, adverse to the appellants, which have been duly assigned as error. *Thornton v. Tutt*, 283 Ala. 72, 214 So. 2d 425; *N. A. A. C. P. v. State*, 274 Ala. 544, 150 So. 2d 677; *Mulkin v. Mc-*

Donough Construction Co. of Ga., 266 Ala. 281, 95 So. 2d 921. The Supreme Court will not search out the record to determine whether or not the trial court might have erred in some particular where an appropriate assignment of error is lacking. *Henry v. Jackson*, 279 Ala. 225, 184 So. 2d 133; *Woods v. City of Tuscaloosa*, 43 Ala. App. 626, 198 So. 2d 306. An appellant must specify in his assignments of error the rulings of the trial court, adverse to him, that he would have the appellate court review. *Greer v. Eye Foundation, Inc.*, 286 Ala. 63, 237 So. 2d 456; *Kinnon v. L. & N. R.R. Co.*, 187 Ala. 480, 65 So. 397; *Wetzel v. Hobbs*, 249 Ala. 434, 31 So. 2d 639; *Thomas v. Brook*, 274 Ala. 462, 149 So. 2d 809. And, adverse rulings not specifically assigned, will not be considered on appeal. *State v. Boone*, 276 Ala. 16, 158 So. 2d 658; *Tidwell v. Town of Town Creek*, 264 Ala. 330, 87 So. 2d 646; *Meadors v. Haralson*, 226 Ala. 413, 147 So. 184.

Likewise, where a brief does not direct the attention of the court to what is deemed error, an appellate court is not required to search the record and cast about for errors not clearly specified in the brief. *Dudley Brothers Lumber Co. v. Long*, 268 Ala. 565, 109 So. 2d 684; *Morton v. Clark*, 10 Ala. App. 439, 65 So. 408.

In its final decree the trial court found that the written instrument, entered into on June 28, 1966, by the Byrds and the Johnstons, appeared to be a validly executed settlement agreement, reciting a valuable consideration of $10,000, which was not only executed, but was notarized as a solemn legal document, and the court further found that it would work irreparable

hardship on appellees, Ray D. Bridges, Calvin S. Byrd and Leon G. Duke to be constantly called upon to defend each and every lawsuit that might be prepared and filed by the appellants J. B. Johnston and Vesta G. Johnston. The court ordered, adjudged and decreed among other matters that the clerk of the court dismiss: (1) case number 29,045, which is styled J. B. Johnston v. Leon G. Duke, Ray D. Bridges, and Calvin S. Byrd, (2) case number 32,512, which is styled Vesta G. Johnston v. Ray D. Bridges, Jerry Benson, H. Few, Leon G. Duke and Calvin S. Byrd, and (3) case number 32,613, which is styled J. B. Johnston v. Calvin S. Byrd and Leon Duke, as agent. The court enjoined the appellants from filing any further litigation on any subject matter relating to the past litigation between Calvin S. Byrd and J. B. Johnston.

The appellants' second and remaining assignment of error is:

> "2. The Court erred in its final decree restraining Respondents from proceeding further with cases numbered, towit (sic), 32512, 32613, and 209,045 (sic) then pending in the Circuit Court of Mobile County, Alabama. (Tr. p. 171)"

The appellants' argument is that the appellees did not carry out the settlement agreement, entered into by the parties on June 28, 1966, and that they therefore are not bound by it. The appellees deny these contentions and insist that their performance was one hundred percent. We have carefully examined and considered the entire record in this case. Without under-

taking to so much as summarize the evidence, suffice it to say that while the testimony on this issue of performance, or not, was in conflict, there was legal evidence to support the appellees' insistence that they performed. The trial court, as it had a right to do, weighed this issue under the evidence in favor of the appellees. This court has repeatedly recognized the rule of law that findings and conclusions of fact made by a trial judge, based on testimony taken ore tenus before him in open court, are presumed to be correct and that such findings and conclusions carry with them the force of a jury verdict. *Renfroe v. Weaver*, 285 Ala. 1, 228 So. 2d 764; *Stephens v. Stephens*, 280 Ala. 312, 193 So. 2d 755. In *Renfroe v. Weaver*, supra, at p. 5, we said:

> "* * * Unless such findings and conclusions are palpably wrong or without some supporting evidence, or are manifestly unjust, which we do not find to be the case, the final decree of the trial court is due to be affirmed. * * *"

Therefore there is no merit in appellants' argument that the settlement agreement was void, or, we might add, was breached by the appellees.

In case number 29,045, which was one of those cases dismissed by the chancellor, J. B. Johnston filed an action at law in the Circuit Court of Mobile County, Alabama, on July 14, 1969, seeking monetary damages against Ray D. Bridges, Calvin S. Byrd, and Leon G. Duke, Jr. and his law partners, and he alleged as ground therefor, a conspiracy by the defendants

for maliciously causing his arrest on May 15, 1964, on a charge of disposing of or removing property, of which charge he was discharged on February 26, 1969.

The appellees insist that they were released and discharged from the appellants' claim, the basis of this action, by the agreement of June 28, 1966.

Mr. Johnston contends that since he was not authorized to maintain his action for malicious prosecution until the termination, in his favor, of the original criminal proceeding against him, the settlement agreement did not affect his right to later sue for malicious prosecution after entering into the release.

Title 7, § 381, Code of Alabama, 1940, Recompiled 1958, provides:

> "* * * All receipts, releases and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties thereto."

There is no ambiguity in the language which the parties used in their written undertaking of June 28, 1966, so the interpretation or construction of the settlement agreement was a function of the court, the judicial purpose and duty being to ascertain the lawful intentions of the parties therein expressed, and to give effect to that intention. *Miles v. Barrett,* 223 Ala. 293, 134 So. 661; *Wright v. McCord,* 205 Ala. 122, 88 So. 150; *Barbour v. Poncelor,* 203 Ala. 386, 388, 83 So. 130; *Gravlee v. Lamkin,* 120 Ala. 210, 24 So. 756.

The preamble to this agreement recites in part:

"COMES NOW Calvin S. Byrd and Estelle Byrd *** and Vesta G. Johnston and J. B. Johnston *** enter into and make this agreement to effect a settlement of all differences between the parties which exist or may have existed in the past, and hereby agree to the following:

* * * *

"* * * the Parties of the Second Part J. B. Johnston and Vesta G. Johnston DO HEREBY AGREE and with this agreement do RELEASE AND DISCHARGE all claims, if any, that may exist or may have existed in the past, or any claims that may have purported to have existed, against all court officials of Mobile County, all officers of the said circuit court of Mobile County, and all law enforcement officers and in particular the Honorable Walter B. (sic) Gaillard, the Honorable Joseph Hocklander, the Honorable Ray D. Bridges, the Honorable John E. Mandeville, and Leon G. Duke, and any and all other persons or officials who have had knowledge of or have executed any official orders in any and all litigation involving Calvin S. Byrd, and the Parties of the Second Part of this agreement heretofore identified as Vesta G. Johnston and J. B. Johnston."

The above quoted language of the contract between the parties shows a clear, unambiguous and comprehensive intent to settle all differences between the parties and release all claims against the persons enumerated. There can be no doubt that one of the "differences between the parties" at that time was the alleged arrest of J. B. Johnston on May 15, 1964, the basis of his claim, for which his action for malicious prosecution was afterwards instituted. We think that the release and discharge of all claims was no comprehensively expressed in the contract as to include the consequences that might result or flow from the alleged wrongful arrest. The stated language of the court's opinion in the case of *Barbour v. Poncelor*, 203 Ala. 386, 388, 83 So. 130, is to this effect. There the court said:

> "* * * For the expression of the purpose manifest upon the face of this release, broader terms could not have been chosen. The effect and operation of the unequivocal terms thus employed — unqualified by anything else appearing in the writing — cannot be restricted to claims known to both the parties or to the releasor only, even though a claim or claims existed in favor of the releasor in consequence of the releasee's fraudulent acts or omission in respect of the sales of the two blocks of stock, of which wrongful acts or omissions the releasor was wholly ignorant until after his release was given; * * *"

The contract of release was sufficiently supported by consideration so as to cover, in addition to those specifically named, but not actual parties to the execution of the settlement agreement, those persons referred to therein. "* * * A consideration for a release moving from a third person on behalf of the releasee to the releasor * * * is as adequate as a consideration moving directly from the releasee to the releasor." 76 C.J.S. Release, § 12, p. 636.

For the reasons we have set forth, the final decree of the trial court is due to be affirmed and the same is hereby affirmed.

AFFIRMED.

Heflin, C.J., Coleman, Harwood, and Bloodworth, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 24 day of Feb. 1972.

(Signed) J. O. SENTELL
Clerk, Supreme Court of
Alabama

RESPONDENTS' APPENDIX B

FINAL DECREE

This cause is submitted for final decree upon the evidence taken by testimony in open Court, and upon the bill of complaint as filed, the answer filed by the Respondents, and the note of evidence in this cause, and the Court having heard all of the testimony both on a preliminary application for a temporary injunction and on the hearing on the merits finds as follows:

The Court has examined Complainants' exhibit six (6) which appears to be a validly executed settlement agreement reciting a v a l u a b l e consideration of $10,000.00 which was not only executed but was notarized as a solemn legal document.

IN ADDITION THERETO, the Court is personally familiar with the history of Case Number 23,091, a law suit by J. B. Johnston against Leon G. Duke, Calvin S. Byrd, Estelle Byrd, Ray D. Bridges and Hugh Ferguson, which the Court not only tried but which the Court knows formed the basis of the decision as found in 284 Ala 359, styled J. B. Johnston vs. Leon Duke, et al, in which the cause of action was based upon an alleged malicious prosecution and was litigated resulting in judgment by the Supreme Court of Alabama adverse to Mr. J. B. Johnston.

The Court has personally examined Equity Case Number 67,278 — Caffey, styled J. B. Johnston and Vesta G. Johnston vs. Leon G. Duke, as agent and attorney for Calvin Byrd, and is of the opinion that

the pleadings in the matter set out therein are directly related to the former controversy, which resulted in a judgment in the Supreme Court December 23, 1970, affirming Judge Caffey's final order dismissing the suit, as reported in 241 So 2d 839.

The Court finds that this matter has not only been the subject of a settlement agreement but has been litigated both on the law and equity side of the courts in Mobile County, as well as a proceeding filed in the United States District Court for the Southern District of Alabama, being case number 3402-64, which went to the Fifth Circuit Court of Appeals.

The Court is of the opinion that it would work irreparable hardship on Ray D. Bridges, Calvin S. Byrd and Leon G. Duke to be constantly called upon to defend each and every lawsuit that might be prepared and filed by the Respondents, J. B. Johnston and Vesta G. Johnston.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court: That the Clerk of this Court shall dismiss from the files of the Court Case Number 27,670, which is styled Vesta G. Johnston and J. B. Johnston vs. Calvin Byrd, and tax the costs of the suit to the Plaintiff in that action; that the Clerk of this Court shall dismiss from the files of this Court Case Number 29,045, which is styled J. B. Johnston vs. Leon G. Duke, Ray D. Bridges and Calvin S. Byrd, and tax the costs to the Plaintiffs; that the Clerk of this Court shall dismiss from the records of this Court Case Number 32,512, which is styled Vesta G. Johnston vs. Ray D. Bridges, Jerry Benson, H. Few, Leon G. Duke and

Calvin S. Byrd, and tax the costs of that proceeding to the Plaintiffs; that the Clerk of this Court shall dismiss from the files of this Court Case Number 32,613, which is styled J. B. Johnston vs. Calvin S. Byrd and Leon Duke, as agent, and tax the costs of that proceeding to the Plaintiff; and the Register of this Court is directed to dismiss from the Equity Court any matter which is now pending in the name of J. B. Johnston and Vesta G. Johnston as Plaintiffs against either Leon G. Duke, Calvin S. Byrd or Ray D. Bridges, the Complainants in this cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the filing of any further legal papers in this Court or any other Court of competent jurisdiction by J. B. Johnston or Vesta G. Johnston, other than an appeal of this Order, against either Leon G. Duke, Ray D. Bridges, individually or as Sheriff of Mobile County, Alabama, any of his agents, deputies or employees, or Calvin S. Byrd, on any subject matter relating to the past litigation between Calvin S. Byrd and J. B. Johnston will constitute a direct contempt of this Court and they and each of them, J. B. Johnston and Vesta G. Johnston, is hereby enjoined, restrained and prohibited from filing any other suits against Leon G. Duke, Ray D. Bridges, individually or as Sheriff of Mobile County, Alabama, any of his agents, deputies or employees, and Calvin S. Byrd, relating to such past litigation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Respondents in this cause, J. B. Johnston and Vesta G. Johnston are taxed with the

costs in these proceedings, for which let execution issue.

DONE this 11 day of March, 1971.

/s/ William D. Bolling
CIRCUIT JUDGE

RESPONDENTS' APPENDIX C

SETTLEMENT AGREEMENT

COMES NOW Calvin S. Byrd and Estelle Byrd, who shall be referred to as Parties of the First Part in this agreement, and Vesta G. Johnston and J. B. Johnston who shall be referred to as Parties of the Second Part, and all of whom are over the age of 21 years and residents of Mobile County, enter into and make this agreement to effect a settlement of all differences between the parties which exist or may have existed in the past, and hereby agree to the following:

Calvin S. Byrd agrees to cancel the judgment of the Circuit Court in Case No. 9146 upon payment of the court costs therein, said costs to be borne equally and paid equally by J. B. Johnston and Calvin S. Byrd.

The Parties of the First Part agree to dismiss that certain suit in the Equity Court of Mobile County, Case No. 63,587-B, which is styled: Calvin S. Byrd vs. Vesta G. Johnston and J. B. Johnston, and further agrees to pay the costs of the court accrued therein.

The Parties of the Second Part, J. B. Johnston and Vesta G. Johnston, agree that all suits presently pending against Calvin S. Byrd and in particular, case No. 19,551 which is styled Vesta G. Johnston vs. Standley (Dobby) Byrd, Wallace W. Rivers, and Wilford Rivers and Calvin S. Byrd, and Case No. 9326 which is styled J. B. Johnston vs. Calvin S. Byrd be dismissed, and it is agreed that the costs of court accrued in these suits will be paid by J. B. Johnston.

For and in consideration of TEN THOUSAND DOLLARS ($10,000.00) which is hereby acknowledged to be paid by the Parties of the Second Part to the Parties of the First Part, the Parties of the First Part agree to convey all of their right, title and interest in that certain real property heretofore owned by J. B. Johnston and which was conveyed to Calvin S. Byrd by a sheriff's deed dated May 25, 1964, and which has been duly recorded in Real Property Book 515, Page 808 of the records of the Probate Judge of Mobile County, Alabama, and in further consideration of said conveyance of the real property to Vesta G. Johnston by the Parties of the First Part, the Parties of the Second Part J. B. Johnston and Vesta G. Johnston DO HEREBY AGREE and with this agreement do RELEASE AND DISCHARGE all claims, if any, that may exist or may have existed in the past, or any claims that may have purported to have existed, against all court officials of Mobile County, all officers of the said circuit court of Mobile County, and all law enforcement officers and in particular the Honorable Walter B. Gaillard, the Honorable Joseph Hocklander, the Honorable Ray D. Bridges, the Honorable John E. Mandeville, and Leon G. Duke, and any and all other per-

sons or officials who have had knowledge of or have executed any official orders in any and all litigation involving Calvin S. Byrd, and the Parties of the Second Part of this agreement heretofore identified as Vesta G. Johnston and J. B. Johnston.

This agreement is made with the understanding by all parties thereto that a mutual release shall be effected by the execution of this agreement, and the only consideration that shall pass between the parties is that which is set out above, and a statutory warranty deed will be delivered by the Parties of the First Part to the Parties of the Second Part at the time that this instrument is executed, and payment of the $10,000.00 consideration referred to above shall be paid over to the Parties of the First Part by the Parties of the Second Part in the form of a cashier's check.

s/ Calvin S. Byrd
Calvin S. Byrd
s/ Estelle Byrd
Estelle Byrd
s/ J. B. Johnston
J. B. JOHNSTON
s/ Vesta G. Johnston
Vesta G. Johnston

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, a Notary Public in and for said State and County, Calvin S. Byrd and Estelle Byrd, who being by me first duly sworn, depose

and say that the statements contained in the foregoing Settlement Agreement are true and correct.

s/ Calvin S. Byrd
s/ Estelle Byrd

SUBSCRIBED and sworn to before me
this 28 day of June 1966.
s/ Leon G. Duke, Jr.
Notary Public, Mobile County, Ala.
(NOTARY SEAL)

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, the undersigned, a Notary Public in and for said State and County, J. B. Johnston and Vesta G. Johnston who being by me first duly sworn, depose and say that the statements contained in the foregoing Settlement Agreement are true and correct.

s/ J. B. Johnston
s/ Vesta G. Johnston

SUBSCRIBED and sworn to before me
this 28 day of June 1966.
s/ Mary B. Dueitt
Notary Public, Mobile County, Ala.
(NOTARY SEAL)